

2024-1388

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

David Scott Brimer,

Petitioner,

v.

Department of the Navy,

Respondent.

**On Petition for Review from the Merit Systems Protection Board
in Case No. AT-3330-21-0119-I-1**

**PETITION FOR REHEARING EN BANC OF PETITIONER DAVID
SCOTT BRIMER**

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January 29, 2026

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**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number: 2024-1388

Short Case Caption: Brimer v. Navy

Filing Party/Entity: David Scott Brimer

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David Scott Brimer		

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STATEMENT PURSUANT TO FEDERAL CIRCUIT RULE 40(c)(1)

Based on my professional judgment, I believe that the panel decision is contrary to the following decisions of the Supreme Court of the United States or the precedents of this Court: *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (explaining that “in interpreting a statute[,], a court should always turn first to one[] cardinal canon before all others” since “courts must presume that a legislature says in a statute what it means and means in a statute what it says there”); *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (holding that courts have a “duty to refrain from reading a phrase into” statutory text).

Kerner v. Department of the Interior—the prior-panel precedent treated as controlling below—incorrectly limited the scope of 5 U.S.C. § 3304(l)(1) to only cover veterans applying for entrance into the federal civil service without ever analyzing the statute’s plain text or finding any ambiguity therein. 778 F.3d 1336 (Fed. Cir. 2015). But the statute’s plain text is clear and contains no such limitation: “veterans . . . may not be denied the opportunity to compete.” 5 U.S.C. § 3304(l)(1).

Dated: January 29, 2026

/s/ Daniel C. Cooley
Daniel C. Cooley

I. ISSUE MERITING EN BANC CONSIDERATION

1. Whether the provision that “veterans . . . may not be denied the opportunity to compete” in section 2 of the Veterans Employment Opportunities Act of 1998 (“VEOA”), Pub. L. No. 105-339, § 2, 112 Stat. 3182, 3182 (1998) (codified at 5 U.S.C. § 3304(l)) (previously codified at 5 U.S.C. § 3304(f)), excludes from its coverage veterans applying for positions from within the federal civil service.

II. STATEMENT OF THE CASE

Mr. Brimer is a federal employee. He applied for a merit promotion from GS-13 Supervisory Human Resource Specialist to GS-14 Assistant Human Resources Officer in the Navy. Appx14. By its own admission, the Navy “dropped the ball” on Mr. Brimer’s application, overlooking paperwork that Mr. Brimer submitted and failing to consider his application before filling the position with another candidate. Appx92-93; Appx14-15; Appx223-224. Mr. Brimer sought relief, alleging the Navy violated his statutory right to compete given by section 2 of the VEOA. 5 U.S.C. § 3304(1)(1) (“Preference eligibles or veterans . . . *may not be denied the opportunity to compete for vacant positions* . . . [filled through] merit promotion procedures.” (emphasis added)). He exhausted his remedies before the agency and filed an appeal to the Merit Systems Protection Board (“Board”). *See* Appx32-39.

Notwithstanding the Navy’s error, the Board’s Final Order denied Mr. Brimer’s claim as a matter of law because it believed the VEOA applies only to

veterans not “already employed in the [f]ederal civil service.” Appx6. To that end, the Board cited *Kerner*, where this Court wrote that the “VEOA is intended to help veterans gain access to federal employment, not preferential treatment in promotion decisions.” 778 F.3d at 1338.

Mr. Brimer timely filed a petition for review of the Board’s decision asking this Court to construe the VEOA as written. Mr. Brimer sought to cabin *Kerner*’s statements about the VEOA as dicta separate from *Kerner*’s central holding since the question presented there did not require determining the VEOA’s scope. Mr. Brimer also asked this Court to overturn the Board’s earlier decision, *Oram v. Dep’t of Navy*, which found that *Kerner*’s interpretation of the VEOA’s scope was precedential and binding on the Board. No. DC-3330-17-0755-I-1, 2022 WL 3971523, at *5 (MSPB Aug. 31, 2022).

A three-judge panel affirmed the Board’s decision. Op. 2. The panel’s opinion found that *Kerner* is binding and bars relief for Mr. Brimer as a matter of law. Op. 5-6. During oral argument, some in the panel underscored that Mr. Brimer “obviously ha[d] a substantial argument on the plain language” and that they “appreciate[d] [his] point on the plain statutory language.” Oral Arg. at 00:55-01:04, 06:55-07:00, https://www.cafc.uscourts.gov/oral-arguments/24-1388_10092025.mp3. But “equally obviously,” Mr. Brimer “ha[s] a problem with [this Court’s] *Kerner* decision.” *Id.* at 00:55-01:04.

III. ARGUMENT

The VEOA is clear: Preference eligibles or veterans “*may not be denied the opportunity to compete for vacant positions*” filled through merit promotion. 5 U.S.C. § 3304(l)(1) (emphasis added). Neither the panel nor the Government has rebutted or even addressed Mr. Brimer’s arguments on plain statutory language. And neither the panel nor the Government has ever defended *Kerner*’s statutory analysis. *See* Op. 5-6; Resp. Br. 11-17. Rehearing en banc would provide this Court the first opportunity to construe the scope of the VEOA with briefing by the parties before it. Mr. Brimer respectfully asks the en banc Court to do what the panel could not: apply the VEOA as written.

The panel in this case signaled the need for en banc review. It acknowledged that it may agree with Mr. Brimer’s plain-text reading of the VEOA, but held that “[e]ven if we agreed with Mr. Brimer” on the scope of § 3304(l)(1), “we are bound by this [C]ourt’s prior decision[]”—in other words, bound by *Kerner*. Op. 6. Neither the panel nor the Government offered a textual defense for *Kerner*’s extra-statutory first-timers-only limitation, which cannot be reconciled with Congress’s unqualified command that “veterans . . . may not be denied the opportunity to compete.” 5 U.S.C. § 3304(l)(1).

This issue is exceptionally important for en banc review. *Kerner* is wrong, and no other circuit can correct it. *See* 28 U.S.C. § 1295(a)(9). *Kerner*’s error has already

forced the Board—after lamenting that the Federal Circuit “seems to have gone well beyond [*Kerner*’s] narrow question”—to overrule multiple prior VEOA precedents and deny relief to Mr. Brimer and many other veterans as a matter of law. *Oram*, 2022 WL 3971523, at *4-5. En banc rehearing is thus the only path to correct *Kerner* and end the ongoing denial of veterans’ statutory right to compete.

A. Section 3304(l)(1)’s Plain Text Is Dispositive—Veterans Like Mr. Brimer “May Not Be Denied” an Opportunity to Compete

1. Section 3304(l)(1)’s Scope Is Limited Only by What Its Text Prescribes; One Must Be a “Preference Eligible[]” or Honorably Discharged “Veteran[]” with Three Years of Service

The plain language of VEOA § 3304(l)(1) provides:

Preference eligibles or veterans who have been separated from the armed forces under honorable conditions after 3 years or more of active service may not be denied the opportunity to compete for vacant positions for which the agency making the announcement will accept applications from individuals outside its own workforce under merit promotion procedures.

5 U.S.C. § 3304(l)(1). To interpret a statutory provision, courts must “start with the plain language of the statute.” *Sunoco, Inc. v. United States*, 908 F.3d 710, 715 (Fed. Cir. 2018) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). And “[i]f the language of the statute is clear and its meaning unambiguous, that is the end of [a court’s] inquiry.” *Electrolux Holdings, Inc. v. United States*, 491 F.3d 1327, 1330 (Fed. Cir. 2007) (citation omitted); *cf. Germain*, 503 U.S. at 254.

Subject to the limitations of what makes one a “[p]reference eligible[]” or an honorably discharged “veteran[],” *all* are entitled to and “may not be denied” from an opportunity to compete for a specific class of vacancies. This case does not concern what an agency must do to satisfy the VEOA’s opportunity-to-compete guarantee. Instead, the Court needs only read “veteran[]” to mean “veteran[.]” In the VEOA, Congress “says . . . what it means and means . . . what it says,” entitling Mr. Brimer, a veteran, to an opportunity to compete. *Germain*, 503 U.S. at 253-54.

The term “veteran” should not have additional limitations engrafted onto it because Congress gave it an express definition. Section 2108 of title 5 defines the terms “veteran” and “preference eligible,” 5 U.S.C. § 2108(1), (3), and the VEOA incorporates those definitions by reference. *See* Pub. L. No. 105-339, § 4, 112 Stat. at 3186 (outlining procedures for preference eligibles “as defined by section 2108 of title 5”). Definitions, where explicit, must be followed by reviewing courts. *Van Buren v. United States*, 593 U.S. 374, 387 (2021). The terms “veteran” and “preference eligible” already define their limitations. A veteran must have “served . . . during a war” or otherwise specified period of conflict. 5 U.S.C. § 2108(1). A preference eligible must be a veteran (as defined in § 2108(1)), or “the unmarried widow or widower of a veteran,” the parent of a “totally disabled veteran,” or some other narrowly defined family member. 5 U.S.C. § 2108(3).

By using the words “veteran” and “preference eligible” and by adding that veterans must be honorably discharged and have three years of active service, the plain text of the VEOA places limits on the opportunity-to-compete guarantee. *See Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-17 (1980) (holding that “[w]here Congress explicitly enumerates certain exceptions . . . , additional exceptions are not to be implied”); *Keene*, 508 U.S. at 206-08. The VEOA’s plain language includes defined boundaries, none of which touch a veteran’s employment status. The VEOA should be construed according to its express text.

2. Congress Knew How to Write Employment-Status Limits—but Did Not Do So Here

This Court has explained that “[w]hether . . . statutory language is unambiguous is determined by the text itself, the context in which the language is used, and the statutory scheme as a whole.” *Sunoco*, 908 F.3d at 715 (citing *Robinson*, 519 U.S. at 341). That overall scheme includes the broader structural “design of the statute.” *Associated Elec. Coop., Inc. v. United States*, 226 F.3d 1322, 1326 (Fed. Cir. 2000) (citation omitted). Should this Court need further support for the VEOA’s unambiguous scope, it can find it in the statute’s design and departure from similar statutes.

a. Congress Expressly Used Employment-Status Limits Elsewhere in § 3304

First, Congress incorporated employment-based limitations in other provisions of § 3304 but chose not to do so in § 3304(l)(1). For example, § 3304(m)(4) defines the advancement eligibility criteria for “*former [time-limited] employee[s]*” of the Department [of Defense]” competing for permanent appointments. 5 U.S.C. § 3304(m)(4) (emphasis added). Section 3304(j) directs the Office of Personnel Management (“OPM”) to promulgate rules concerning if and how “experience of an individual in a position other than the competitive service” may be considered in a competitive-service appointment. *Id.* § 3304(j). Where Congress desired to qualify or limit opportunities for competitive service based on civil employment status, it did so expressly. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (“[I]t is generally presumed that Congress acts intentionally and purposely in . . . disparate inclusion or exclusion.” (citation omitted)). Not so in § 3304(l)(1).

b. The Veterans’ Preference Act Speaks in Terms of Veterans’ “Entrance” into Federal Service, Underscoring the Absence of Any Such Limitation in § 3304(l)(1)

Second, Congress incorporated employment-based limitations outside of the VEOA but—again—chose not to do so in § 3304(l)(1). In another statute relating to veterans’ employment rights—The Veterans’ Preference Act of 1944 (“VPA”),

Pub. L. No. 78-359, 58 Stat. 387 (1944)—Congress stated that “[a] preference eligible who receives a passing grade in an examination for *entrance* into the competitive service is entitled to additional points.” 5 U.S.C. § 3309 (emphasis added). Unlike the VEOA, the VPA has been correctly construed as a first-timer-only statute by its terms. It applies only to vacancies filled through competitive examination and *not* to merit promotions or transfers. *Kerner*, 778 F.3d at 1338 (citations omitted).

Notably, in enacting the VPA, Congress used the word “entrance” to accord special point preferences to veterans seeking admission into the civil service, but not promotion within it. *Cf. Crowley v. United States*, 527 F.2d 1176, 1182 (Ct. Cl. 1975). Where Congress wished to limit a statute to “entrance” only, it did so expressly. *See Strategic Hous. Fin. Corp. v. United States*, 608 F.3d 1317, 1330 (Fed. Cir. 2010) (“[C]ourts should interpret statutes with similar language that generally address the same subject matter together, as if they were one law.” (internal quotation marks and citation omitted)). The VPA proves the point: when Congress meant entrance only, it said so. The VEOA does not—it protects “veterans.”

**c. The Word “Access” in the VEOA’s Subheading
Cuts Against a First-Timer Restriction**

Third, the VEOA’s headings give a broad view of the statute’s plain meaning. “Access” in the heading of section 2 of the VEOA connotes a broad protective meaning. § 2, 112 Stat. at 3182. Section 2 is not titled “Access for [Some] Veterans”

or “Access for [Noncivil service] Veterans.” “Access” to an employment opportunity applies just as well to an employed veteran, like Mr. Brimer, seeking access to another employment prospect. This comports with the way ordinary people speak: contemporary dictionaries confirm that “access for veterans” simply means that “veterans”—subject to express limitations within the statute—have the ability to make use of the VEOA’s guarantee of an opportunity to compete. *See Access*, MERRIAM WEBSTER’S DICTIONARY (10th ed. 1998) (“freedom or ability to obtain or make use of”). That is to say, the word “access” reinforces the safeguarding function of the VEOA—that of providing an opportunity to compete—without limiting who can make use of it.

3. The Enacted Legislative Record Shows That Congress Rejected Employment-Status Limits in Earlier Proposed Versions of the VEOA

Should this Court find ambiguity in the VEOA or seek additional support for the statute’s plain meaning, here “legislative history, for those who care about it, puts extra icing on a cake already frosted.” *Yates v. United States*, 574 U.S. 528, 557 (2015) (Kagan, J., dissenting).

On January 7, 1997, Congressman John Mica introduced H.R. 240, the “Veterans Employment Opportunities Act of 1997.” H.R. Rep. No. 105-40, pt. 1, at 13 (1997). It was then referred to the Committee on Government Reform and Oversight, which produced a preliminary report on March 20, 1997. *Id.* at 1. The

Committee reported the bill to the full House where it passed and was received by the Senate on April 10. *Id.* at 13; 143 Cong. Rec. S3010 (daily ed. Apr. 10, 1997). Crucially, that bill as first-introduced by Congressman Mica and then referred to the Senate *had explicit employment-related exceptions*. Section 3304(f)(1), now 3304(l)(1), then read:

No preference eligible, and no individual (other than a preference eligible) who has been separated from the armed forces under honorable conditions after 3 or more years of active service, shall be denied the opportunity to compete for an announced vacant position within an agency, in the competitive service or the excepted service, *by reason of—*
[](A) not having acquired competitive status; or
[(B) not being an employee of such agency.

H.R. Rep. No. 105-40, pt. 1, at 2 (emphases added); H.R. 240, 105th Cong. (as introduced Jan. 7, 1997), at 2 (1997).

Congress dropped this employment-based qualifying provision, ultimately opting for broader language covering all preference eligibles or honorably discharged veterans. 5 U.S.C. § 3304(l)(1). *See* H.R. Rep. No. 105-40, pt. 1, at 2. “Congress’ rejection of the very language that would have achieved the result the Government urges weighs heavily against the Government’s interpretation.” *Hamdan v. Rumsfeld*, 548 U.S. 557, 558 (2006).

B. *Kerner*'s Statutory Construction Overlooks § 3304(l)(1)'s Plain Text and Instead Begins with Statutory Headings and Earlier-in-Time Legislative History

Kerner's gloss on the VEOA must be peeled back. Its rationale is grounded, not on the statutory text, but on a limited review of the legislative history and statutory headings. This error alone is sufficient for this Court to grant rehearing en banc. *Cf. Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 269-70 (2022) (explaining that "the quality of the reasoning in a prior case has an important bearing on whether it should be reconsidered" (citations omitted)).

1. *Kerner* Does Not Engage with § 3304(l)(1)'s Text

Kerner's statutory construction begins with a simple premise: "The text of the VEOA shows that it is intended to assist veterans in gaining access to federal civil service employment, not to give veterans preference in merit promotions." 778 F.3d at 1338. Yet *Kerner* does not substantiate that premise. *Kerner* focuses instead on (1) the words "eligible to apply" in § 3304(l)(4), (2) the heading of section 2 of the VEOA, and (3) legislative history. *Id.* at 1338-39. This was error.

Kerner makes a passing reference to the words "eligible to apply" in § 3304(l)(4). *Id.* at 1338. Section 3304(l)(4), however, is a posting requirement directed to agencies, not a grant of eligibility. It requires that "merit promotion announcements . . . indicate that preference eligibles and veterans who have been separated from the armed forces under honorable conditions after 3 years or more of

active service are eligible to apply.” 5 U.S.C. § 3304(l)(4). *Kerner* takes this to mean that “Congress intended the VEOA to assist veterans otherwise ineligible to apply.” 778 F.3d at 1338. But § 3304(l)(4) applies where agencies consider applicants from inside the federal civil service. 5 U.S.C. § 3304(l)(4) (requiring announcements for positions “*which include consideration of individuals of the [f]ederal workforce*” (emphasis added)). The same individuals who are “eligible to apply” in § 3304(l)(4) are guaranteed an “opportunity to compete” in § 3304 (l)(1). Neither section imports an employment limitation.

Kerner also fails to engage with the other limitations already present in the VEOA. *See* discussion *supra* Section III.A.1. Only “[p]reference eligibles” and honorably discharged “veterans” with 3 years active service can benefit from the VEOA. 5 U.S.C. § 3304(l)(1). None of the many limitations as to what makes one a preference eligible or qualifying veteran deal with a veteran’s employment. In holding that veterans already employed in the civil service are exempt, *Kerner* read words into the VEOA—namely, “noncivil service” before “veterans.” This too was in error. *See Keene*, 508 U.S. at 206-08.

2. *Kerner* Incorrectly Relies on Statutory Headings Without First Finding Ambiguity in the VEOA; In Any Event, Those Headings Should Be Read More Inclusively

In *Kerner*, this Court wrote that “§ 2 of the VEOA, which amended § 3304([l]), is titled ‘Access for Veterans,’ showing that the VEOA is intended to

help veterans gain access to federal employment, not preferential treatment in promotion decisions.” 778 F.3d at 1338.

In treating the VEOA’s remedial scheme like that of the VPA, *Kerner* read in a first-timer limitation into the VEOA through the word “[a]ccess.” *Id.* But “[a]ccess” in the VEOA is unlike “entrance” in the VPA. For one, while “entrance” lay in the statutory text, “[a]ccess” is a mere subtitle. *See Carter v. United States*, 530 U.S. 255, 267 (2000) (“[T]he title of a statute is of use only when it sheds light on some ambiguous word or phrase in the statute itself.” (cleaned up) (citation omitted)). A heading cannot “‘override the plain words’ of a statute.” *Dubin v. United States*, 599 U.S. 110, 121 (2023) (citation omitted). Congress chose not to include the subtitle in the positive law codification of the VEOA. A reviewing court must first find some ambiguity in the VEOA before turning to this subtitle. And even if the statute’s heading were properly reached, Congress’s use of the word “access” undercuts this Court’s holding in *Kerner*. A veteran enjoys “access” if he receives an “opportunity to compete” irrespective of his present employment status. *See* discussion *supra* Section III.A.2.c.

3. *Kerner* Uses Legislative History Dating to an Earlier Unenacted Version of the VEOA, and It Misses Other Congressional Comments

Kerner’s problems run deeper still: most of the legislative history relied upon in *Kerner* dates to the *unenacted* version of the VEOA that contained an express

employment-based limitation. *See supra* Section III.A.3; H.R. Rep. No. 105-40, pt. 1, at 2.

On September 21, 1998, the Senate Committee of Veterans Affairs produced a report striking out the employment-qualifying language of old § 3304(l)(1), leaving nothing in its place. *See* S. Rep. No. 105-340, at 1 (1998). On October 5, 1998, an amendment was introduced in the Senate adding the now-final language of § 3304(l)(1). 144 Cong. Rec. S11497 (daily ed. Oct. 5, 1998) (text of S. Amend. 3738). It was described only as an amendment “[t]o improve the bill” and passed unanimously. *Id.* at S11508. That same day, the bill in its entirety passed in the Senate, as amended. It was agreed to by the House on October 8 and signed into law on October 31. Pub. L. No. 105-339, 112 Stat. at 3190. In short, all legislative history before September 21, 1998, refers to an earlier unenacted version of the VEOA that contained employment-based limitations to the opportunity-to-compete guarantee.

Perhaps inadvertently, *Kerner* relied almost exclusively on the legislative history from the earlier, employment-limited version of the VEOA to find that it protects only noncivil service veterans. This was error. *Kerner* noted that “[w]hen introducing the original version of the VEOA, Senator Charles Hagel stated that the purpose of the VEOA was to help veterans ‘*get and hold jobs with the Federal Government.*’” 778 F.3d at 1339 (citation omitted). But this statement dates to July

1997, and the “original version” *Kerner* refers to is the unenacted version. *See* 143 Cong. Rec. S7603-04 (daily ed. July 16, 1997). The same can be said for the statements excerpted in *Kerner* of Congressmen Maloney and Pappas describing the VEOA’s impact on “*not already civilian employees*” and lamenting veteran neglect “when it comes to *obtaining federal employment*.” *See* 778 F.3d at 1339 (citations omitted). And even if these statements had been about the final version of the VEOA, they do not clearly exclude veterans who already have federal employment.¹

That leaves only one piece of legislative history in *Kerner*: a statement by Congressman Mica, the principal sponsor of the VEOA’s counterpart bill in the House. In it, Congressman Mica explained that “[v]eterans who do not work for the Federal Government are barred from even competing on their merits for these jobs. That will change when this legislation is enacted.” 778 F.3d at 1339 (citation omitted).

¹ Because these remarks were inserted into the *Congressional Record* ex post—rather than spoken “by a Member . . . on the floor” and heard by other Members—they have limited interpretive weight. 143 Cong. Rec. E623, E631 (daily ed. Apr. 10, 1997); 144 Cong. Rec. H10083, H10190 (daily ed. Oct. 8, 1998); *cf. Hamdan v. Rumsfeld*, 548 U.S. 557, 580 n.10 (2006). Congressman Pappas’s statement is even less probative because it was not printed until October 8, after Congress had already voted to pass the VEOA. 144 Cong. Rec. at H10190; *see Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 118–19 (1988) (discounting post-enactment statements that “cannot possibly have informed the vote” on the law).

Congressman Mica was correct: The VEOA prevents agencies from disallowing “[v]eterans who do not work for the Federal Government” from applying. But that is not all it does. As Congressman Mica himself explained in the same colloquy, the VEOA provides “that consideration may not be denied to *preference eligibles applying for certain positions . . .*” 144 Cong. Rec. H10185 (daily ed. Oct. 8, 1998) (emphasis added). It is not limited to just those preference eligibles who do not work for the federal government, though it may be particularly helpful to them. This is because, as Congressman Mica put it, the VEOA plainly extends to “veterans entitled to preference and other veterans who have 3 years of honorable service in the military.” *Id.* at H10188. Under the VEOA, all such veterans “receive expanded opportunities to compete for [f]ederal jobs.” *Id.* Congressman Mica’s full comments paint a more inclusive picture. And Congress crafted the plain text of the statute to benefit all veterans, “recogniz[ing] that the men and women who served in our armed forces have indeed served as Federal employees,” and as such, we should “honor[] and recognize[] that service.” *Id.*

IV. CONCLUSION

For the foregoing reasons, this Court should vacate the panel opinion and grant en banc review to clarify the meaning of 5 U.S.C. § 3304(l)(1) as it applies to veterans outside the federal civil service.

Respectfully submitted,

Date: January 29, 2026

/s/ Daniel C. Cooley

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Addendum

United States Court of Appeals for the Federal Circuit

DAVID SCOTT BRIMER,
Petitioner

v.

DEPARTMENT OF THE NAVY,
Respondent

2024-1388

Petition for review of the Merit Systems Protection Board in
No. AT-3330-21-0119-I-1.

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

AFFIRMED

FOR THE COURT

December 17, 2025
Date


Jarrett B. Perlow
Clerk of Court

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION,
TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32 and Federal Circuit Rule 32.

This brief contains 3,781 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font, Times New Roman.

Date: January 29, 2026

/s/ Daniel C. Cooley

Daniel C. Cooley

United States Court of Appeals for the Federal Circuit

DAVID SCOTT BRIMER,
Petitioner

v.

DEPARTMENT OF THE NAVY,
Respondent

2024-1388

Petition for review of the Merit Systems Protection
Board in No. AT-3330-21-0119-I-1.

Decided: December 17, 2025

DANIEL COOLEY, Finnegan, Henderson, Farabow, Gar-
rett & Dunner, LLP, Reston, VA, argued for petitioner.
Also represented by J. DEREK MCCORQUINDALE;
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STEPHEN J. SMITH, Commercial Litigation Branch,
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ington, DC, argued for respondent. Also represented by
PATRICIA M. MCCARTHY, YAAKOV ROTH, FRANKLIN E.
WHITE, JR.

Before TARANTO, STOLL, and CUNNINGHAM, *Circuit Judges*.

STOLL, *Circuit Judge*.

David S. Brimer petitions for review of the Final Order of the Merit Systems Protection Board denying his request for corrective action under the Veterans Employment Opportunities Act of 1998. Because Mr. Brimer was a federal employee seeking a merit promotion, 5 U.S.C. § 3304(f)(1) does not apply to him and we affirm.

BACKGROUND

Mr. Brimer is a preference-eligible disabled veteran. Mr. Brimer was employed by the Naval Bureau of Medicine and Surgery as a GS-13 Supervisory Human Resources Specialist. While in that position, he applied for a merit promotion to a GS-14 Assistant Human Resources Officer position with the Naval Education and Training Command. The position Mr. Brimer applied to was open to “[c]urrent permanent employees, [Veterans Employment Opportunities Act of 1998 (VEOA)] eligibles, and DoD Military Spouse Preference (MSP) eligibles.” J.A. 77. Mr. Brimer’s application was not referred to the hiring official because the agency mistakenly believed that Mr. Brimer did not submit documents reflecting that he met the time-in-grade (TIG) requirement for the position. Mr. Brimer filed a VEOA complaint with the Department of Labor, Veterans’ Employment and Training Service (VETS), on October 20, 2020. On October 22, 2020, the position was offered to another applicant. On November 18, 2020, nearly four weeks after the position was offered to someone else, the Navy received notice of Mr. Brimer’s complaint, and identified the error made regarding Mr. Brimer’s eligibility. The Navy reviewed Mr. Brimer’s application and determined that Mr. Brimer was not among the most highly qualified candidates for the position. On December 2, 2020, VETS issued a letter closing

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the file on Mr. Brimer's VEOA complaint and notified him of his appeal rights.

Mr. Brimer timely filed an appeal with the Merit Systems Protection Board, "alleg[ing] that the agency obstructed his right to compete for employment and violated his veterans' preference rights" under 5 U.S.C. § 3304(f)(1) (2017).¹ J.A. 3; J.A. 16. Subsection (f)(1) states:

Preference eligibles or veterans who have been separated from the armed forces under honorable conditions after 3 years or more of active service may not be denied the opportunity to compete for vacant positions for which the agency making the announcement will accept applications from individuals outside its own workforce under merit promotion procedures.

5 U.S.C. § 3304(f)(1).

The administrative judge denied Mr. Brimer's request for corrective action under the VEOA, stating that while the agency initially erred in finding Mr. Brimer unqualified, this error "was corrected by a merit review of [Mr. Brimer]'s application." J.A. 18. Mr. Brimer filed a petition for Board review. The Board affirmed the initial decision, stating that while it disagreed with the administrative judge's reasoning, Mr. Brimer was not entitled to corrective action under the VEOA as a matter of law. Specifically, relying on *Kerner v. Department of the Interior*, 778 F.3d 1336 (Fed. Cir. 2015), the Board held that Mr. Brimer was not entitled to any corrective action based on a denial of an opportunity to compete under § 3304(f)(1) because Mr. Brimer was already a federal employee, and

¹ The current version of 5 U.S.C. § 3304 was enacted in 2024 and the relevant provision in subsection (f)(1) is now in subsection (l)(1).

§ 3304(f) is inapplicable to veterans who are already employed by the federal government.

Mr. Brimer now petitions for judicial review of the Board's final order. We have jurisdiction under 28 U.S.C. § 1295(a)(9).

DISCUSSION

We must affirm the Board's decision unless we find it to be "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c); *see also Hornseth v. Dep't of the Navy*, 916 F.3d 1369, 1373 (Fed. Cir. 2019).

When filling vacancies, "[f]ederal agencies generally use two types of selection processes": "open competition and merit promotion." *Kerner*, 778 F.3d at 1337. "Open competition is used for employees seeking to join the competitive service." *Id.* (citing *Joseph v. Fed. Trade Comm'n*, 505 F.3d 1380, 1381 (Fed. Cir. 2007)). "Merit promotion is 'used when the position is to be filled by an employee of the agency or by an applicant from outside the agency who has 'status' in the competitive service.'" *Id.* (quoting *Joseph*, 505 F.3d at 1381). It is undisputed that the vacancy at issue here was a merit-promotion vacancy.

On appeal, Mr. Brimer challenges the Board's holding that the opportunity to compete in § 3304(f) is inapplicable to veterans who are already employed by the federal government. In particular, Mr. Brimer argues that the Board misread this court's decision in *Kerner*. According to Mr. Brimer, *Kerner* only addressed whether an agency must consider a veteran's non-federal civil service experience under 5 U.S.C. § 3111 when giving a veteran an opportunity to compete under § 3304(f)(1). Pet. Br. 25. Mr. Brimer argues that *Kerner* focused on "whether *preferential treatment*—not the fundamental *right to compete*—

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can flow from . . . § 3311 through § 3304 to federally employed veterans.” *Id.* at 31.

After considering Mr. Brimer’s arguments, we conclude that the Board properly interpreted *Kerner* as holding that § 3304(f) is inapplicable to federally employed veterans. In that case, Mr. Kerner was employed by the Department of the Interior and applied for two merit promotion vacancies. *Kerner*, 778 F.3d at 1337. Both positions required applicants to meet TIG requirements, and the Department of the Interior determined that Mr. Kerner did not meet either TIG requirement, and found him unqualified for both positions. *Id.* We affirmed the Board’s denial of corrective action, concluding that because Mr. Kerner was already employed by the federal government, § 3304(f) was inapplicable to his case. *Id.* at 1338–39. To arrive at this holding, we interpreted § 3304(f) and expressly held that “[v]eterans already employed by the competitive service are already ‘eligible to apply’ to merit-promotion vacancies and thus cannot be the intended target for § 3304(f).” *Id.* at 1338 (quoting 5 U.S.C. § 3304(f)).

Mr. Brimer urges us to ignore this specific statement and others in *Kerner* regarding the inapplicability of § 3304 to veterans already employed by the federal government. According to Mr. Brimer, these statements are made in isolation and not meant to be binding on all federally employed veterans. Pet. Br. 26–27. We disagree. While *Kerner* involved both §§ 3311 and 3304(f), this court reached its ultimate holding in the case by limiting § 3304(f) to veterans who are not already employed by the federal government. Citing the title of the VEOA, the title of § 2 of the VEOA (which amended § 3304(f)), language in § 3304(f)(4), and the legislative history, the court reasoned that these sources demonstrate “that Congress did not intend for § 3304 to apply when a veteran or other preference-eligible applicant is already employed in federal civil service.” *Kerner*, 778 F.3d at 1338–39.

Mr. Brimer next argues that “to the extent *Kerner* actually held that § 3304(f)(1) never applies to federally employed veterans, it must be clarified or overruled.” Pet. Br. 33 (capitalization normalized). Even if we agreed with Mr. Brimer, however, we are bound by this court’s prior decisions. See *Newell Cos. v. Kenney Mfg. Co.*, 864 F.2d 757, 765 (Fed. Cir. 1988) (“This court has adopted the rule that prior decisions of a panel of the court are binding precedent on subsequent panels unless and until overturned in banc.”). Thus, we must affirm the Board’s decision that Mr. Brimer was not entitled to any corrective action based on a denial of an opportunity to compete under § 3304(f)(1).

Mr. Brimer contends that *Kerner* is inconsistent with this court’s prior decisions in *Joseph* and *Lazaro v. Department of Veterans Affairs*, 666 F.3d 1316 (Fed. Cir. 2012). But these cases are inapposite as they do not address the same question as *Kerner*. While *Joseph* addressed whether a preference-eligible veteran had been afforded an opportunity to compete under § 3304(f)(1), the court held that Mr. Joseph had been given a full opportunity to compete. 505 F.3d at 1383. The court therefore had no occasion to address whether § 3304(f) applies to both veterans seeking employment with the federal government and veterans already employed by the federal government. Likewise, *Kerner* is consistent with *Lazaro* because that case addressed Mr. Lazaro’s nonfrivolous allegation that the VA violated his rights under 5 C.F.R. § 302.302(d), a regulation relating to veteran’s preference. See *Lazaro*, 666 F.3d at 1319. Importantly, the court did not address any issues that required interpretation of § 3304(f) and whether it applies to preference-eligible veterans already employed by the federal government.

We thus affirm the Board’s decision denying Mr. Brimer’s request for corrective action under the VEOA.

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CONCLUSION

We have considered Mr. Brimer's remaining arguments and find them unpersuasive. For the reasons stated above, we affirm the Board's decision denying Mr. Brimer's claims.

AFFIRMED

COSTS

No costs.